

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the Matter of

Amendment of Section 76.51
of the Commission's Rules to
Include Clermont, Florida in the
Market Presently Designated the
"Orlando-Daytona Beach-Melbourne-
Cocoa, Florida" Market

MM Docket No. _____

RECEIVED

APR 10 1992

TO: Roy J. Stewart, Chief
Mass Media Bureau

Federal Communications Commission
Office of the Secretary

PETITION FOR RULE MAKING

1. Press Broadcasting Company, Inc. ("Press"), permittee of Station WKCF(TV), Clermont, Florida, hereby requests that the Commission undertake such proceedings as may be necessary in order to amend Section 76.51 with respect to the market presently designated as the "Orlando-Daytona Beach-Melbourne-Cocoa, Florida" market so as, at a minimum ^{1/}, to redesignate that market as the "Orlando-Daytona Beach-Melbourne-Cocoa-Clermont, Florida" market.

^{1/} For Press' immediate purposes, it will suffice merely to amend the designation of the market in question. However, as set forth in greater detail below, the overall listing of markets in Section 76.51 suffers a number of problems arising from the fact that the listing has not been updated in approximately seven years. To the extent that the Commission may wish to take this opportunity to bring its market listing into conformity with current socio-economic statistics -- or perhaps more likely, to take the opportunity to incorporate the instant request with the Commission's on-going review of the market listing and related matters, such as program exclusivity, *see, e.g., Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Gen. Docket No. 87-24, Further Notice of Proposed Rule Making, 3 FCC Rcd 6171 (1988) -- Press would have no objection as long as Clermont is added to Orlando, Daytona Beach, Melbourne and Cocoa in the designation of that market.

No. of Copies rec'd _____
List A B C D E

078

Regulatory Background

2. The listing set forth in Section 76.51 was originally intended and designed to serve as a mechanism for the implementation of the Commission's "must-carry" rules which mandated carriage of certain broadcast signals by cable systems. From time to time the listing was amended to assure that it conformed to actual market conditions relevant to the policies underlying the "must-carry" rules. *See, e.g., Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, FL)*, 57 R.R.2d 685 (1985). The market conditions examined in this connection included the relevant stations' Grade B contours (which, as a general rule, reflect the geographic area on which stations may expect to rely for economic support), the extent to which those contours overlapped one another (and, thus, established the existence of "a single television market for economic purposes"), and the Arbitron designation of the market. *Id.*

3. The underlying "must-carry" rules, however, were declared unconstitutional by the U.S. Court of Appeals for the District of Columbia Circuit in 1985 and, again, in 1987. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. Nat'l Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 106 S.Ct. 2889 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). Since that time, the Commission has had no occasion to invoke its "must-carry" rules and no regulatory impetus to amend the Section 76.51 listing.^{2/} Thus, despite the facts that, since 1985 (the last time the Section 76.51 listing was revised), new stations have commenced operation, Arbitron designations have been revised, and very significant demographic and economic changes have occurred in various market areas, the Commission's market listing has remained frozen as of 1985.

^{2/} This is not to say that there is universal agreement as to the correctness of the listing as it has stood, unchanged, for some seven years. To the contrary, at least one proposal for modification of the listing has been pending for years. *See* 3 FCC Rcd at 6180, n.15. No action has been taken on that proposal presumably because the Commission is understandably averse to spending its limited resources in the revision of a listing which, since the demise of "must-carry", has lost much (if not most) of its relevance to any existing Commission regulatory program.

3. While the Commission's inertia in this regard may not be unreasonable from the Commission's own parochial regulatory perspective vis-à-vis the "must-carry" rules, the Section 76.51 listing *does* affect non-Commission matters, most especially the question of copyright liability for cable retransmission of broadcast signals. Section 111 of the Copyright Act requires cable operators to pay royalty fees for the carriage of distant, as opposed to local, broadcast signals. While the Copyright Act is administered by the Copyright Office, that Act mandates that the definition of "local" and "distant" for these purposes is to be established by reference to the Commission's "must-carry" rules. *Major Television Markets, supra*. Thus, the on-going accuracy of the Section 76.51 market listing -- which was a basic element of the Commission's now-defunct "must-carry" rules -- is a matter of substantial and legitimate continuing concern to affected broadcasters and cable operators.

Factual Background

4. As noted above, Press operates Station WKCF(TV) ("WKCF"), Clermont, Florida. Clermont is located approximately 20 miles west of Orlando. However, WKCF's transmitter is located approximately 20 miles *east* of Orlando, at a *de facto* antenna farm in Bithlo, Florida. Because of the location of its antenna, WKCF's signal is -- and has been, since the station commenced operation in late 1988 ^{3/} -- substantially similar to those of television stations licensed to Orlando. Moreover, since the station's transmitter site has at all times been located well within the area generally defined by Orlando, Daytona Beach, Melbourne and Cocoa. The station's signal reaches and has always reached the vast majority of that market area.

^{3/} Originally, WKCF operated on Channel 68 from a different antenna site somewhat to the north of its current site. Since October, 1991, the station has operated, pursuant to automatic program test authority, on Channel 18 from a site in Bithlo, Florida. In both cases, however, it was effectively co-located with one or more Orlando stations. As a result, its Grade B contour has at all times been entirely encompassed by (if not coterminous with) the Grade B contours of one or more Orlando stations, and has substantially overlapped the Grade B contours of all other Orlando stations.

5. Because of its location, WKFC has, since it commenced operation, competed directly with all other major commercial television stations in the market. This has meant, among other things, that Press has been forced to acquire programming at prices determined by the Orlando market (as opposed to any separate "Clermont" market which might otherwise be said to exist). And, while virtually all of the cable operators throughout the market understood that the station was, in practical effect, "local", Press initially encountered some questions from some cable operators as to whether carriage of WKCF would be exempt from the copyright royalties.

6. Mindful of the interrelationship of the Commission's rules and policies relating to "must-carry", territorial programming exclusivity, and syndicated programming exclusivity, and equally mindful that the "must-carry" rules had been moribund since before WKCF commenced operation, Press sought in September, 1989 to obtain from the Commission a determination concerning the station's local nature. By letter dated September 26, 1989, Press noted that the concept of television "markets" was central to the interrelated goals of defining "must-carry" status and establishing limits for permissible program exclusivity. It also pointed out that

Press has encountered certain program suppliers and cable operators who have questioned the Station's territorial exclusivity rights. . . . Likewise, some cable operators have expressed uncertainty as to the extent of exclusivity to which Press is entitled -- and, indeed, even as to whether the Station should be carried at all on their systems because of potential copyright liability.

Press Request for Declaratory Ruling, September 26, 1989, at 6. Because of the "insistence of . . . certain cable operators and program suppliers . . . with whom Press is commercially involved", *id.* at 9, Press sought a ruling confirming its understanding that WKCF was to be deemed "local" to the Orlando-Daytona Beach-Melbourne-Cocoa market.

7. The Commission effectively granted Press' request in *Request for Ruling by Press Television Corporation Concerning Applicability of Section 73.658(m) of the Commission's Rules in the Orlando-Daytona Beach-Melbourne-Cocoa Television Market*, 4 FCC Rcd 8799 (1989). There the Commission confirmed that, notwithstanding that Clermont is not a "designated" community in

the Orlando-Daytona Beach-Melbourne-Cocoa market (*i.e.*, "Clermont" does not appear in the composite name of the market), WKCF is indeed "local" to that market. While the specific relief provided in that decision was couched as a waiver of the Commission's territorial exclusivity rule (*i.e.*, Section 73.658(m)), the language used by the Commission appeared clearly to indicate that this determination concerning WKCF's "local" nature was to be treated as relating as well to the overall market structure of the Orlando-Daytona Beach-Melbourne-Cocoa market. For example, at least one opposing party had urged that "the proper procedure for [achieving the results sought by Press] is the inclusion of Clermont as a designated community in the market at the conclusion of a Rule Making proceeding." In response, the Commission noted that

We do not intend to abandon the general policy of treating market structure issues through the Rule Making process. . . . However, where there is a factual apttern as unambiguous as that here and where the rule appears to be functioning in conflict with its intended purpose, we will not decline to act during the interim period until the matter is addressed in Docket 87-24.

4 FCC Rcd at 8801, ¶12.^{4/}

8. On reconsideration, the Commission affirmed that decision. In so doing, however, it appeared to narrow somewhat the precise focus of its original ruling. In particular, it left open the narrow question of whether the waiver it had granted Press in 1989 was intended to constitute a determination that WKCF was "local" for copyright purposes. *See Request for Ruling by Press Television Corporation Concerning Applicability of Section 73.658(m) of the Commission's*

^{4/} The belief that the declaratory ruling/waiver issued by the Commission was intended to reach beyond the mere question of territorial exclusivity was supported by the Commission's reference to "Docket 87-24". In the *Further Notice of Proposed Rulemaking*, FCC 88-322, released October 21, 1988, in that proceeding, the Commission specifically recognized that the Section 76.51 listing (together with the copyright implications inherent in that listing) was directly interrelated with the program exclusivity rules. *See Further Notice of Proposed Rulemaking* at ¶¶35-37. In that Notice the Commission also expressly and specifically sought comments on whether (and if so, how) to amend the listing in light of developments occurring since the list was first adopted. In particular, the Commission noted that "we believe that it may be appropriate to update the list of television markets applicable to this rule to reflect current market designations." *Id.* at ¶35. Thus, the Commission had demonstrated its awareness of the interrelationships inherent in the request presented by Press, and the Commission had indicated that it intended to address all of those interrelated aspects in Docket No. 87-24.

Rules in the Orlando-Daytona Beach-Melbourne-Cocoa Television Market, 6 FCC Rcd 6563, 6566, ¶14 (1991). ^{2/} In order to eliminate any possibility of further confusion or uncertainty, Press is therefore submitting the instant Petition formally seeking revision of the Commission's designation of the Orlando-Daytona Beach-Melbourne-Cocoa market to include Clermont as a designated community.

Discussion

9. The factual basis for Press' instant petition has previously been set forth by Press in its original request for ruling, and effectively adopted by the Commission in its 1989 and 1991 rulings, concerning the local nature of WKCF. As the Commission recognized in its 1989 ruling,

there can be little doubt that WKCF(TV) is in fact unavoidably competitive with other stations in the [Orlando-Daytona Beach-Melbourne-Cocoa] market. . . .

4 FCC Rcd at 8800, ¶8. That recognition conclusively establishes that, for economic purposes, WKCF participates in a common television market with stations licensed to Orlando, Daytona Beach, Melbourne and Cocoa. Moreover, there can be no question but that Press relies on that entire area -- which is encompassed by its Grade B contour (and, indeed, in large measure by its Grade A contour) -- for economic support. Moreover, Arbitron has notified Press that Arbitron has, since its November, 1991 rating book, designated WKCF as a "home" station, signifying that, at least in Arbitron's view, the station is part of the Orlando marketplace. *See* Attachment A. Thus, all of the factors which the Commission found sufficient to support redesignation of the same market to include Melbourne and Cocoa are present in support of Press' proposal to redesignate the market to include Clermont. *See Major Television Markets, supra*.

^{2/} Press had thought that the copyright aspect of its initial request had been set forth in that request. Certainly the parties who opposed that request addressed themselves in significant part to that specific question. And, when the Commission first acted in December, 1989, Press thought it equally clear that that decision encompassed the copyright aspect; so too did Press' opponents, whose petition for reconsideration specifically focused on that presumed aspect of the decision.

10. Similarly, the factors which the Commission deemed to be decisional in *Television Muscle Shoals*, 48 R.R.2d 1191 (1980), recon. denied, 87 F.C.C.2d 507 (1981), all weigh heavily in favor of the requested redesignation. In *Television Muscle Shoals* the Commission considered the following factors: (1) the proximity of the proposed community and the existing designated communities *and* the proximity of the requesting station and other stations licensed to the already designated communities; (2) the extent to which the proposed redesignation would expand the requesting station's carriage rights beyond its Grade B contour; (3) the particularized need of the requesting station for the change; and (4) an indication that the public would benefit from the proposed change. *Television Muscle Shoals*, 48 R.R.2d at 1194; *Major Television Markets*, *supra*, 57 R.R.2d at 692.

11. With respect to the proximity factor, Clermont is itself only approximately 20 miles west of Orlando. The closeness of Clermont to the overall market area can be seen from the fact that WKCF's transmitter has at all times been effectively co-located with the transmitter of one or another station licensed to one of the designated communities in the market. This is not, then, a situation where a distant suburban station is seeking to aggrandize itself with market identification even though its signal merely penetrates a corner of the overall market; to the contrary, this is a situation where the requesting station is and has always been operating in the heart of the market, providing service throughout the market, and directly competing for audience with all other market stations. The Commission's 1989 and 1991 decisions relative to Press' earlier request for declaratory ruling establish this clearly. Thus, this factor weighs heavily in favor of the proposed redesignation.

12. Since, as discussed above, WKCF already provides an over-the-air signal to virtually all of the existing market, redesignation would not significantly expand its carriage rights. While some slight expansion would occur, by far most of the market area -- and, thus, the area in which "carriage rights" would arguably be created -- is already well within the station's existing service area. The same is largely true of all other stations currently licensed to other designated

communities in the market: their signals already reach much (if not most) of any potential expansion area and, in any event, the benefits which might be derived from expansion of the area would be shared commonly by all those market station. This, too, weighs in favor of the proposed redesignation.

13. With respect to the third factor, a very particular need for redesignation exists. The Copyright Office has advised one cable operator in the area of Cocoa -- *i.e.*, in the southeastern-most corner of the station's service area -- that that system's carriage of WKCF from January 1, 1990 through June 30, 1991 was not exempt from copyright royalties because, in the view of the Copyright Office, the station constituted a "distant" signal. As a result, the cable operator may arguably be subject to additional royalties for which, it has notified Press, it will look to Press for indemnification.

14. Press and the affected cable operator have argued to the Copyright Office that its decision concerning WKCF's status as a "distant" station (and, thus, the cable operator's potential liability) is inconsistent with, *inter alia*, the Commission's 1989 determination that WKCF is "local" to the market. The Copyright Office, however, has responded that, absent a specific ruling by the Commission to include Clermont in the market designation, the Copyright Office would deem WKCF to be "distant" with respect to the Cocoa cable system. *See Attachment B hereto.* While Press has been able to correct this particular situation through the construction and operation of a low power television station, *id.*, Press is concerned that similar situations might arise in the future. Under the compelling factual circumstances presented here, Press is clearly entitled to be free of *any* such concerns.


14. Finally, the public will benefit from the proposed redesignation in precisely the same way that the public benefitted from the last redesignation of this particular market. WKCF is an independent station. It therefore brings to the market's audience a different mix of programming than would otherwise be available. This contribution to the diversity of the area's programming is a

strong plus in favor of redesignation.

15. Thus, all four of the *Television Muscle Shoals* factors support redesignation, as does the factual and legal analysis of *Major Television Markets*. In view of these controlling precedents, Press submits that the addition of "Clermont" to the designation of the existing "Orlando-Daytona Beach-Melbourne-Cocoa" market is clearly justified -- indeed, any contrary action would be purely arbitrary, capricious and inconsistent with controlling precedent.

WHEREFORE, for the reasons stated, Press Broadcasting Company, Inc. requests that the designation, in Section 76.51 of the Commission's Rules, of the market currently titled "Orlando-Daytona Beach-Melbourne-Cocoa" be revised to include, with that designation, "Clermont".

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Press Broadcasting
Company, Inc.

April 10, 1992

ATTACHMENT A

The Arbitron Company

ARBITRON

Michael C. Spitalnik
Eastern Division Manager
Television Station Services

October 30, 1991

Mr. Robert McAllan
President
Press Broadcasting
3601 New Jersey Highway 66
Neptune, NJ 07753

Dear Bob:

This letter will put into writing our recent conversation regarding the elimination of the home non-ADI (HN) designator for WKCF/Orlando.

Effective with the November rating book, WKCF will be designated as a home (H) station. This should clear up any confusion as to WKCF's status in the Orlando marketplace.

If there are any other issues, either now or in the future, please do not hesitate to call.

Best regards,



MES:ba

ATTACHMENT B



The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

September 11, 1991

(202) 707-8350

Dear Mr. Wilner:

Thank you for your letter of August 13, 1991 regarding the local/distant status of WKCF(TV) in Clermont, Florida. Specifically, your client, American Television and Communications Corporation (ATC), owner and operator of a cable television system serving Melbourne, Cocoa and other communities in Brevard County, Florida, takes issue with two Copyright Office Licensing Division letters questioning ATC's reported carriage of WKCF(TV). You request that the letters be withdrawn and that this Office issue a written declaration that WKCF(TV) is a local signal to ATC's Melbourne/Cocoa system.

Let me briefly explain the reasons why the Licensing Division was required to issue the letters in question. The letter of November 14, 1990 involved ATC's reported carriage of WKCF(TV) for the 1990/1 accounting period as a local signal. The communities served by ATC are clearly outside the specified zone of Clermont, and there is no FCC ruling that WKCF(TV) is significantly viewed in those communities. In short, it appeared evident to the Office that WKCF(TV) was a distant signal, and we offered ATC the opportunity to reevaluate the local/distant status of the signal and make any necessary changes to the statement of account.

ATC's filing for the second accounting period of 1990 reported WKCF(TV) as distant, but stated that it was a permissible commercial UHF station within the grade B contour and hence not a 3.75% signal. Examination of the 1990 Cable Atlas revealed the communities served by ATC to be outside WKCF(TV)'s grade B contour, requiring the Licensing Division letter of June 20, 1991. Once again, we offered ATC the chance to make any changes to the statement of account that it felt were necessary.

We have preliminarily examined ATC's filing for the 1991/1 accounting period and note that WKCF(TV) has again been reported as a distant permitted commercial UHF station with the grade B contour. For the same reasons offered in the June 20, 1991 letter, the Office questions this reported carriage since it does not appear that the communities served by ATC in the Melbourne/Brevard County area fall within WKCF(TV)'s grade B contour.

The Office is required to apply section 111 of the Copyright Act as written, which, for purposes of calculating royalties, also requires an application of the FCC's former carriage and must carry rules. Unfortunately, with deregulation in 1981 and invalidation of the must carry rules in the mid-1980's, the FCC has ceased making determinations relevant to the compulsory licensing scheme. You have presented an impressive list of reasons as to why the FCC, if it were still in the business of making such rulings, would have included Clermont and WKCF(TV) in the Orlando-Daytona Beach-Melbourne-Cocoa hyphenated market. But the fact remains that the FCC has not so ruled, and the Office is faced with no choice but to apply Commission rules and regulations as it finds them. Until the FCC decides otherwise, WKCF(TV) remains a distant signal to the communities served by ATC.

Press Broadcasting Corporation, the parent of WKCF(TV), has informed us that it has purchased a low power station, W04CN, in Cocoa, Florida. Beginning in April of this year, W04CN is simulcasting the programming of WKCF(TV). It appears to us that if ATC carries W04CN, it may report that signal as local because the communities served by ATC fall within the specified zone of W04CN. ATC, therefore, now has a means of carrying the programming of WKCF(TV) to its subscribers without incurring the additional royalty fees of a distant signal.

Having made the position of the Office clear, we will file the 1990/1 and 1990/2 statements of account without further question and, pending complete examination of the 1991/2 filing, shall do the same for that statement.

Sincerely,



Ralph Oman
Register of Copyrights

John R. Wilner, Esq.
Bryan, Cave, McPheeters & McRoberts
700 Thirteenth Street, N.W.
Washington, D.C. 20005-3960